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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

THEO WHITE, Warden,
Petitioner,

v.

MICHAEL EDWARD VANSICKEL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a state statute granting criminal defendants 20 peremptory challenges create a liberty interest protected by the due process clause of the Fourteenth Amendment?

2. When a federal court sitting in habeas announces as a new rule of constitutional criminal procedure that the denial by the state court of half of the statutory complement of peremptory challenges to which a defendant is entitled deprives the defendant of a protected liberty interest in violation of due process, has the federal court announced a new rule in violation of *Teague* v. *Lane*, 489 U.S. 288 (1989)?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

No. _____

THEO WHITE, Warden, *Petitioner*,

v.

MICHAEL EDWARD VANSICKEL, *Respondent*.

OPINION OR JUDGMENT BELOW[1/]

Petitioner respectfully petitions for a writ of certiorari to review the January 27, 1999, decision of the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") in *Vansickel v. White*, 166 F.3d 953 (9th Cir. 1999) (No. 97-17143) (Appendix A), which affirmed the judgment of the United States District Court for the Eastern District of California denying Respondent's habeas corpus petition. Respondent is a prisoner in state custody pursuant to a judgment of conviction in the Superior Court of the State of California.

Petitioner has included the following orders and opinions as Appendices: (A) the Ninth Circuit's opinion in *Vansickel v. White*, 166 F.3d 953 (hereafter "*Vansickel*"); (B) the Ninth Circuit's unpublished Order denying Petitioner's Petition for Rehearing With Suggestion for Rehearing En Banc, filed May 3, 1999 (No. 97-17143); (C) the Findings and Recommendations of the Magistrate

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1. This section contains the citations required by Rule 14(d) of the Rules of the Supreme Court of the United States.

Judge; (D) the Order by the District Court adopting in part and modifying in part the Findings and Recommendations; (E) the text of pertinent constitutional provisions, statutes, and court rules, namely: (1) the Sixth Amendment to the United States Constitution; (2) the Fourteenth Amendment to the United States Constitution; (3) California Code of Civil Procedure § 231.

Pursuant to Rule 12.7 of the Rules of the Supreme Court of the United States, Petitioner will cite to or quote from the record, even though the record has not been transmitted to the Court.

STATEMENT OF JURISDICTION

The Ninth Circuit entered its judgment on January 27, 1999. On May 3, 1999, the Ninth Circuit denied Petitioner's Petition for Rehearing With Suggestion for Rehearing En Banc. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONS, STATUTES OR REGULATIONS

Because of the length of the relevant constitutional provisions, statutes, and court rules, their pertinent text is set out in Appendix E. These authorities include: the Sixth Amendment to the United States Constitution; the Fourteenth Amendment to the United States Constitution; and California Code of Civil Procedure § 231.

STATEMENT OF THE CASE

On January 9, 1992, the District Attorney of Tehama County filed a one-count information against Respondent Michael Edward Vansickel charging him with first degree murder (Cal. Pen. Code, § 187) and further alleging the special circumstance of murder by lying-in-wait (Cal. Pen. Code, § 190.2, subd. (a)(15)). CT 2-3.[2/]

On May 20, 1992, the matter came on regularly for jury trial. CT 42. During a chambers conference prior to jury selection, defense counsel stated that he believed he was only entitled to ten peremptory challenges, and the court agreed. RT 578, 581-582. During jury selection, counsel for Respondent exercised ten peremptory challenges. RT 163-165. On May 29, 1992, the jury returned its verdict finding Respondent guilty of first degree murder as charged and finding true the special circumstance. CT 60.

Following the conviction, the trial court realized that the parties were in fact entitled by statute to twenty peremptory challenges, and brought the matter to the attention of counsel. RT 580. On June 29, 1992, defense counsel made an oral motion for new trial based on the denial of peremptory challenges. CT 141.

On July 13, 1992, the matter came on for judgment and sentence. The court denied the motion for new trial and sentenced Respondent to prison for life without possibility of parole. CT 157.

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2. CT denotes the Clerk's Transcript. RT denotes the Reporter's Transcript. Certified copies of both are on file with the clerk of the California Court of Appeal, Third Appellate District. Uncertified copies of the Clerk's Transcript and Reporter's Transcript were lodged with the clerk of the United States District Court for the Eastern District of California. Portions of both were included within the Excerpts of Record (EOR) and Supplemental Excerpts of Record (SEOR) filed with the Ninth Circuit.

Respondent's conviction was affirmed on appeal in the Third District Court of Appeal of California on May 2, 1994. EOR 22. Respondent's petition for review in the California Supreme Court was denied on July 21, 1994. EOR 114. Respondent's petition for writ of habeas corpus in the Third District Court of Appeal of California was denied on October 6, 1994. EOR 116. Respondent's petition for writ of habeas corpus in the California Supreme Court was denied on February 22, 1995. EOR 118.

Respondent filed his petition for writ of habeas corpus in federal district court on July 26, 1995. CR 1.[3] On May 20, 1997, the Magistrate Judge issued his Findings and Recommendations, in which he recommended that the writ of habeas corpus be granted. Appendix C. In those Findings and Recommendations, the Magistrate Judge rejected all claims in the petition save one, finding that although there existed a procedural bar to the claim, Respondent had established cause and prejudice sufficient to overcome the procedural bar. Appendix C, pp. 24-29.

Petitioner filed objections to the Magistrate Judge's Findings and Recommendations on June 5, 1997. CR 25.[4] After oral argument, the district court on August 18, 1997, issued an order adopting in part the Magistrate Judge's Findings and Recommendations, but finding that Respondent had failed to demonstrate cause and prejudice. Appendix D, pp. 6-8. The petition was denied and the case dismissed. Appendix D, p. 9; CR 30, 31.

Respondent filed a timely notice of appeal on September 17, 1997. CR 32. A certificate of probable

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3. CR denotes the Court Record as reflected on the PACER docket sheet.

4. In those objections, the *Teague* issue was briefed extensively, but was not addressed by the District Court in its Order.

cause was issued on September 29, 1997. CR 33. After briefing and oral argument, the Ninth Circuit issued its published opinion on January 27, 1999.[5] Petitioner and Respondent each filed timely petitions for rehearing and petitions for rehearing en banc, which were denied on May 3, 1999.

REASONS FOR GRANTING THE PETITION

In *Ross v. Oklahoma*, 487 U.S. 81, 91, n.4 (1988), this Court expressly declined to decide whether state action which denies or impairs the right to exercise peremptory challenges in violation of state law constitutes a due process violation. In the eleven years since *Ross*, the unanswered question has percolated[6] among the lower courts, resulting in confusion and conflicting opinions among the circuits. The laboratory of the lower courts[7] has done as much as it can, and it now falls upon this Court to answer the issue left open in *Ross*.

Moreover, this case can serve as a vehicle for clarifying the application of *Teague* in the due process context. Although the liberty interest doctrine is not itself new, the application of that doctrine to various aspects of the criminal trial process by lower federal courts inevitably

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5. The *Teague* issue was extensively briefed for the Ninth Circuit. At oral argument, the panel specifically informed counsel that they were not interested in the *Teague* issue. The published opinion does not mention *Teague* whatsoever.

6. The principle of issue percolation was discussed extensively by Justice Stevens in his dissent in *California v. Carney*, 471 U.S. 386, 400-401, n. 11 (1985).

7. See *U.S. v. Szabo*, 789 F.2d 1484, 1489, n. 7 (10th Cir. 1986).

results in new rules which were not dictated by precedent prior to their announcement.

By answering the two questions presented, this Court can clarify the methodology to be used in determining whether a given procedural rule for criminal trials does or does not create a liberty interest protected by the due process cause, whether a violation of that rule constitutes a violation of due process, and whether the determination that a due process violation has occurred in such circumstances is a new rule within the meaning of *Teague*.

Rule 10 of the Rules of the Supreme Court of the United States ("Rule 10") describes the considerations governing review on certiorari. It provides, in pertinent part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; . . .
> >
> > . . .
> >
> > (c) a state court or a United States court of appeals has decided an important question of federal law that

> has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

. . . .

In the present case, certiorari should be granted for the reasons noted above. *Vansickel* misconstrues *Ross* as to whether statutorily mandated peremptory challenges give rise to a liberty interest protected by the due process clause. The Ninth Circuit's opinion in *Vansickel* conflicts with at least four other circuits which have struggled to interpret *Ross*. This case therefore presents a conflict among the circuits (Rule 10(a)), as well as a conflict with relevant decisions of this Court (Rule 10(c)), in that it unjustifiably extends *Ross*, and in so doing, runs afoul of *Teague*.

ARGUMENT

THE NINTH CIRCUIT'S *VANSICKEL* DECISION CONFLICTS WITH UNITED STATES SUPREME COURT PRECEDENT AND OTHER FEDERAL CIRCUIT COURT PRECEDENT BECAUSE THE STATUTORY RIGHT TO PEREMPTORY CHALLENGES IS NOT A PROTECTED LIBERTY INTEREST, AND A DETERMINATION OTHERWISE CONSTITUTES THE ANNOUNCEMENT OF A NEW RULE IN VIOLATION OF *TEAGUE*

In the opinion below, the Ninth Circuit determined that the erroneous denial of half of the statutory complement of peremptory challenges constituted a due process violation because the statute created a protected liberty interest. Appendix A, p. 13. Petitioner submits this determination represents a misinterpretation of *Ross*, an unjustified extension of the liberty interest doctrine, and a violation of *Teague*.

In *Ross*, the defendant was forced to use one of his nine statutorily granted peremptory challenges to excuse a juror who should have been excused for cause. *Ross*, 487 U.S. at 83. Oklahoma law required defendants to use their peremptory challenges on such jurors to preserve claims of erroneous for cause denials.[8] *Id.* at

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8. California has a similar rule:

> In order to complain on appeal about the trial court's decisions overruling his challenges for cause, defendant must show: (1) he used a peremptory challenge to remove the juror in question; (2) he exhausted his peremptory challenges or can justify his failure to do so; and (3) he was dissatisfied with the jury as selected. *People v. Morris*, 53 Cal.3d 152, 184 (1991). However, because of the manner in which the denial occurred in the instant case, the situation is more akin to the question left open in *Ross*. See n. 9, *infra*.

89. This Court first determined that there was no Sixth Amendment violation unless the jury which hears the case is less than impartial. *Id.* at 88. In so doing, this Court noted that:

> We have long recognized that peremptory challenges are not of constitutional dimension. [Citations.] They are a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.

Ibid.

This Court then turned to the Fourteenth Amendment due process considerations. In attempting to resolve the issue, this Court declared:

> Because peremptory challenges are a creature of statute and are not required by the Constitution, [citations], it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise. [Citations.] **As such, the "right" to peremptory challenges is "denied or impaired" only if the defendant does not receive that which state law provides.**

Id. at 89, emphasis added. The meaning of the language highlighted above was left in doubt by a footnote appearing later in the opinion. Noting that Oklahoma state law required the use of peremptory challenges to preserve for cause challenges, this Court declared that Ross received all that state law allowed him, and thus had not established a due process claim. This Court then stated in a footnote:

> We need not decide the broader question whether, in the absence of Oklahoma's limitation on the "right" to exercise peremptory challenges, "a denial or impairment" of the exercise of peremptory challenges occurs if the defendant uses one or more challenges

to remove jurors who should have been excused for cause.[9]

It is the interplay between the due process holding of *Ross* and the statement in footnote 4 which must be resolved to eliminate the confusion now permeating the various circuit courts. The Ninth Circuit's opinion below is merely the latest (and perhaps the most egregious) misguided attempt to reconcile the two passages.

A. A Brief Survey Of The Holdings Of Courts Across The Country Which Have Dealt With The Denial Of Peremptory Challenges

Federal courts in different circuits have addressed the denial of peremptory challenges in light of *Ross* with widely differing results. Most circuits do not even necessarily agree on the meaning of this Court's decision in *Ross*, and fewer still understand how to conduct the proper analysis for the situation reserved in *Ross*.

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9. Petitioner notes that in most cases involving the denial of peremptory challenges, the alleged "denial" arises out of one or more allegedly erroneous denials of for cause challenges, requiring the defendant to exercise one or more peremptory challenges to remove the objectionable juror. In the instant case, through an oversight by the court, prosecutor, and counsel, jury selection was conducted under the assumption that the parties were entitled to 10 rather than 20 peremptory challenges. Nevertheless, Vansickel was "denied" a number of peremptory challenges in the same sense as if the trial court had initially given him the 20 to which he was entitled, but had erroneously denied 10 for cause challenges, requiring him to use 10 of his 20 challenges to correct the trial court's error. Petitioner submits that the manner in which the peremptory challenges are denied has no bearing on whether the denial itself is a violation of due process.

In *Satcher v. Pruett*, 126 F.3d 561, 573 (4th Cir. 1997) the petitioner claimed that the Virginia trial court had erroneously denied a for cause challenge, forcing him to use a peremptory challenge to excuse the juror. The district court agreed that the juror should have been excused for cause. However, it was concerned that granting relief would implicate *Teague*. *Id.* at 574. The Fourth Circuit reviewed *Ross* and found that unlike Oklahoma, Virginia did not require that peremptory challenges be used to preserve challenges for cause. Thus, the case squarely presented the issue left open in *Ross*. However, the Fourth Circuit declined to resolve the question, noting,

> This question was explicitly left undecided by the Supreme Court in *Ross*, which was decided in 1988. The Court has not revisited the issue since then. This suggests that the rule was not dictated by existing precedent in 1993. . . . Continuing confusion about the meaning of footnote four in *Ross*, however, indicates to us that the rule [petitioner] seeks was not dictated by existing precedent in 1993.

Id. at 575.

Similarly, in *Murray v. Delo*, 34 F.3d 1367 (8th Cir. 1994), the defendant alleged the erroneous denial of for cause challenges which caused him to use three peremptory challenges was a due process violation. The court cited *Ross* and found that "the Supreme Court has not specifically decided this question." *Id.* at 1378.

Although the Fourth and Eighth Circuits correctly recognized that the issue remained open, other circuits have misinterpreted *Ross*. For example, in *Kirk v. Raymark Indus. Inc.*, 61 F.3d 147, 159-160 (3rd Cir. 1995), the court dissected the *Ross* opinion extensively, specifically focusing on the due process claim, and ultimately concluded: "Thus, *Ross* holds that there is no constitutional violation mandating reversal unless a party can show that the jury was not impartial."

In *Nethery v. Collins*, 993 F.2d 1154, 1160 n.20, (5th Cir. 1993), the Fifth Circuit read *Ross* as

> finding no due process or sixth amendment violation where capital murder defendant exhausted his peremptory challenges removing a juror who should have been excused for cause in the absence of a showing that any juror who ultimately was seated was subject to removal for cause.

The court in *United States v. Towne*, 870 F.2d 880 (2nd Cir. 1989), appeared to read *Ross* as prohibiting a due process challenge to the denial of peremptory challenges in the absence of a showing of actual prejudice when it held:

> [S]o long as the jury which was ultimately selected was fair and impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean that the sixth amendment was violated. [Citation.] Since appellant has in no way established the partiality of the jury that ultimately convicted him, he may not successfully claim deprivation of his sixth amendment *or due process rights.*

Id. at 885, emphasis added.

Thus, prior to the opinion below, at least five different circuits had interpreted *Ross*. Two had properly concluded that the question remained unanswered. However, three others misread *Ross* as requiring some showing of actual juror bias to establish a due process violation.[10] The Ninth Circuit's opinion in *Vansickel*, however, is diametrically opposed to other circuits and goes well beyond *Ross* by stating that there is a liberty interest in the full statutory complement of peremptory

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10. While this ultimately may be required, it is beyond dispute that this Court has not yet held it to be so.

challenges, and further, that the denial of same violates due process, regardless of actual juror bias.

B. The Liberty Interest Doctrine Cannot Be Used To Constitutionalize Every State Procedural Rule

In addition to taking a quantum leap beyond this Court's holding in *Ross*, the Ninth Circuit also manufactured a liberty interest where none had previously existed, and where it is inappropriate to do so.

In *Hicks v. Oklahoma*, 447 U.S. 343 (1980), this Court recognized a liberty interest in certain state sentencing procedures, noting that due process preserves against the arbitrary deprivation of liberty by the state, when state law specifically leaves it to the jury to determine the extent of any deprivation of that liberty. In *Hewitt v. Helms*, 459 U.S. 460, 466 (1983), this Court clarified the liberty interest doctrine, noting that "Liberty interests protected by the Fourteenth Amendment may arise from two sources--the Due Process Clause itself and the laws of the States." *Id.* at 466. This Court went on to find that the Due Process Clause did not create a liberty interest in being confined in the general population in prison. *Id.* at 467.

The same term, this Court decided another liberty interest case in the prison context. In *Olim v. Wakinekona*, 461 U.S. 238 (1983), this Court first decided that the Due Process Clause itself did not provide any liberty interest in remaining incarcerated within a single state rather than being subject to interstate transfers. *Id.* at 248. This Court then went on to analyze the specific prison regulations to determine whether they created a liberty interest, ultimately concluding that they did not. *Id.* at 250-251.

A similar analysis was used by this Court in subsequent prison regulation cases (see, e.g., *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989), culminating in *Sandin v. Conner*, 515 U.S. 472 (1995), in which this Court again found that neither the Due Process Clause nor the prison regulations established a liberty interest. In *Sandin*, this Court attempted to rein in what it perceived to be an overly broad interpretation of the protection available via the liberty interest doctrine. Eschewing the "mandatory language" and "substantive predicates" tests articulated in earlier opinions, this Court returned to the approach announced in *Meachum v. Fano*, 427 U.S. 215 (1976) and *Wolff v. McDonnell*, 418 U.S. 539 (1974). *Sandin*, 515 U.S. at 480-483. Under this approach, states may still create liberty interests.

> But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, [citations], nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Id. at 484.

As a result, this Court significantly limited the viability of liberty interest due process claims in cases of alleged violations of routine prison regulations. However, this Court left unanswered the viability of liberty interest claims outside the prison context. Few opinions of this Court shed much light on the degree to which such claims should be entertained, and how to conduct any meaningful analysis of such claims in the context of state rules of criminal procedure. In the absence of such guidance, and without relying on any authority from this Court, the Ninth Circuit in the opinion below expanded due process by finding a liberty interest in the full statutory complement of peremptory challenges.

Analysis of the instant error is difficult because the denial of peremptory challenges is neither a restraint on physical liberty (see *Sandin*) nor is it a violation of a prison regulation with mandatory language and substantive predicates. What this case demonstrates is that there is a gaping void in the law concerning whether and to what extent due process liberty interests exist in state criminal procedure statutes. One circuit has determined that: "A state cannot be said to have a federal due process obligation to follow all of its procedures; such a system would result in the constitutionalizing of every state rule, and would not be administrable." *Levine v. Torvik*, 986 F.2d 1506, 1515 (6th Cir. 1993).

Notwithstanding this astute observation, the Ninth Circuit has extended the liberty interest doctrine without any analysis by simply noting that state statutes "may" create liberty interests and concluding that the statute at issue in the instant case does so. As a published opinion, *Vansickel* provides no guidance as to what kinds of statutes may or may not be found in the future to create liberty interests. All that can be said of *Vansickel's* analysis in this regard is that, apparently, any statute "may implicate a liberty interest." Appendix A, p. 13.

The opinion below unjustifiably expands the liberty interest doctrine so as to make the violation of every state statute a potential constitutional violation. To compound matters, the opinion below does so without any analysis of or limitation on the liberty interest doctrine. The inevitable result of this opinion will be to open the field such that all manner of pedestrian state law claims are entertained by federal habeas courts via the "back door" of due process. This Court should therefore clarify precisely what the prerequisites are for habeas jurisdiction in situations where the state violates its own procedural rules.

C. Notwithstanding This Court's Ultimate Determination Of Whether Due Process Is Implicated When Peremptory Challenges Are Denied, The Ninth Circuit's Opinion Below Announces A New Rule In Violation Of *Teague*

In *Teague v. Lane*, this Court held that outside of two narrow exceptions, "habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure...." 489 U.S. at 360. Despite this clear principle, which has been repeatedly reaffirmed by subsequent decisions of this Court, the Ninth Circuit nevertheless created a new constitutional rule of criminal procedure when it determined that, under the due process clause of the Fourteenth Amendment, the denial of the full statutory complement of peremptory challenges violated appellant's constitutional rights.

The opinion below announced the new rule then unabashedly emphasized this fact repeatedly. In the second paragraph of the opinion, the court framed the issue thusly: "This case presents the question whether the erroneous denial of peremptory challenges provided for by state statute violates a defendant's due process rights under the United States Constitution." Appendix A, p. 6. In the first part of the analysis, the court stated: "The first issue we address is whether denial of peremptory challenges provided for by a state statute violates a state criminal defendant's federal constitutional rights." *Id.* at 11. Still later in the opinion, after referencing a recent Ninth Circuit decision finding a Fifth Amendment due process violation, the court again stated: "Because the due process requirement of the Fifth Amendment is incorporated into the Fourteenth Amendment, the first question we confront in this state habeas case is whether the erroneous denial of peremptory challenges provided for by California law violated Vansickel's due process rights under the Fourteenth Amendment." *Id.* at 13.

Therefore, it cannot be denied that the case addressed a constitutional rule of criminal procedure. Nor can it be argued that the case issued a specific holding: "We hold that Vansickel's constitutional rights were violated because he did not receive the full complement of peremptory challenges he was entitled to under California law." *Id.* at 6.

Despite extensive briefing on *Teague* below, the opinion below fails to even address the issue. Rather, the Ninth Circuit announced a new rule of constitutional criminal procedure without even attempting to articulate why such an opinion was not in violation of *Teague*. As a result, it is impossible to identify with specificity the errors in their analysis, other than to note that the announcement of a new rule in violation of *Teague* is in direct contradiction to the well-established precedent of this Court.

Nor does it matter that Vansickel ultimately did not obtain relief in the opinion below. *Teague* prohibits both the application *and the announcement* of new rules on habeas corpus. In *Saffle v. Parks*, 494 U.S. 484, 108 L Ed. 2d 415, 100 S. Ct. 1257 (1990), the Supreme Court explained the way the *Teague* analysis should proceed:

> Parks petitions the federal courts for a writ of habeas corpus. As he is before us on collateral review, we must first determine whether the relief sought would create a new rule under our holdings in *Teague* [] and *Penry* [.] If so, *we will neither announce nor apply the new rule* sought by Parks unless it would fall into one of two narrow exceptions.

Id. at 487-488, emphasis added.

In fact, virtually every opinion of this Court discussing *Teague* has indicated that the announcement of rules on habeas is prohibited just as much as is their application. *Caspari v. Bohlen*, 510 U.S. 383, 396-397 (1994) [granting writ was error "because doing so required the *announcement and application* of a new rule of

constitutional law"]; *Graham v. Collins*, 506 U.S. 461, 466-467 (1993), quoting *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989) ["Under *Teague*, new rules will not be applied *or announced* in cases on collateral review..."]; *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) [*Teague* means new rules "will not be *announced or applied* on collateral review"].

Even *Teague* itself counseled against the announcement of new rules.

> If there were no other way to avoid rendering advisory opinions, we might well agree that the inequitable treatment described above is "an insignificant cost for adherence to sound principles of decision-making." [Citation.] But there is a more principled way of dealing with the problem. We can simply *refuse to announce a new rule* in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated.

Teague, 489 U.S. at 316, emphasis added.[11/]

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11. Many lower federal courts have also read *Teague* as forbidding the announcement of new rules as well as their application. See, e.g., *U.S. v. Brown*, 117 F.3d 471, 479 (11th Cir. 1997) ["As the Supreme Court has explained, '*Teague* stands for the proposition that new constitutional rules of criminal procedure will not be announced or applied on collateral review.'"]; *Oliver v. U.S.*, 90 F.3d 177, 179 (6th Cir. 1996) [same]; *Turner v. Williams*, 35 F.3d 872, 878 (4th Cir. 1994) [Under *Teague*, new rule will not be announced or applied]; *Wedra v. Lefevre*, 988 F.2d 334, 340 (2nd Cir. 1993) [same]; *Greenawalt v. Ricketts*, 943 F.2d 1020, 1024 (9th Cir. 1991) ["A new rule may not be announced on collateral review any more than it can be applied on it."]; *Davis v. Maynard*, 911 F.2d 415, 417 (10th Cir. 1990) ["*Teague* dictates that a new rule will not be announced or applied on collateral review save two exceptions: ..."]; *Newlon v. Armontrout*, 885 F.2d 1328, 1332 (8th Cir. 1989).

Since the opinion below fails to mention *Teague* at all, petitioner briefly sets out the pertinent law necessary to undertake a proper *Teague* analysis.

The first stage of the *Teague* analysis is the determination of the date of finality of the conviction. "A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari v. Bohlen*, 510 U.S. at 390, 114 S.Ct 948, 127 L.Ed.2d 236. Vansickel's petition for review to the California Supreme Court was denied on July 21, 1994. Under Rule 13.1 of the United States Supreme Court Rules, a petition for a writ of certiorari to review a state court judgment is timely if filed within 90 days after the entry of that judgment by the state court of last resort. Therefore, Vansickel's judgment became final for non-retroactivity purposes 90 days after July 21, 1994, or October 20, 1994.

The second stage requires a survey of the existing legal landscape at the time of finality. *Id.* at 390. The inquiry under *Teague* is "whether it would have been objectively unreasonable, under the law existing [at the time petitioner's conviction became final], for a judge to reach a contrary result to that" urged by petitioner on habeas review. *O'Dell v. Netherland*, 95 F.3d 1214, 1223-1224 (4th Cir. 1996). Whenever the actual holding of a precedent is "susceptible to debate among reasonable minds," (*Butler v. McKellar*, 494 U.S. 407, 415, 108 L.Ed.2d 347, 110 S. Ct. 1212 (1990)), or among "reasonable jurists," (*Sawyer v. Smith*, 497 U.S. 227, 234, 111 L. Ed. 2d 193, 110 S. Ct. 2822 (1990)), then the application of that "holding" on federal habeas review would constitute the application of a new rule in violation of *Teague* and its progeny.

In addition to the circuit court opinions discussed above in section I.A,[12] there were exactly five other cases extant at the time of finality which could have informed the state court: *Hines v. Enomoto*, 658 F.2d 667, 671-672 (9th Cir. 1981); *Watson v. Camp*, 848 F.2d 89 (7th Cir. 1988); *Celestine v. Blackburn*, 750 F.2d 353, 360 (5th Cir. 1984); *Pruett v. Thigpen*, 665 F. Supp. 1254, 1264 (N.D. Miss. 1986); and *Workman v. Cardwell*, 338 F.Supp 893, 896 (N.D. Ohio, 1972), aff'd in 471 F.2d 909, 911 (6th Cir. 1972), cert. den. 412 U.S. 932 (1973.) As will be shown, the landscape created by these cases could charitably be described as rocky.

In *Hines*, the defendant was entitled by statute to 26 peremptory challenges and received only 13.[13] The district court found there was no federal question. *Hines*, 658 F.2d at 671. The Ninth Circuit acknowledged there was no constitutional right to peremptory challenges, but recognized several cases where peremptories were found to be an "important" right. *Id.* at 671-672, citing *Pointer v. United States*, 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208 (1894) and *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965).

In *Hines*, the Ninth Circuit specifically noted and rejected the only other then extant federal case dealing with the denial of peremptory challenges. In *Workman v. Cardwell*, the Seventh Circuit held that the limitation on peremptory challenges was a matter of state law, not

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12. *Nethery v. Collins*, 993 F.2d 1154, *Murray v. Delo* 34 F.3d 1367, and *U.S. v. Towne*, 870 F.2d 880, all existed prior to October, 1994. *Kirk* and *Satcher* postdated finality, as did *Satcher v. Netherland*, 944 F.Supp. 1222 (E.D. Va. 1996), the published district court opinion which later became *Satcher v. Pruett*.

13. At the time, peremptory challenges in California were governed by a different section of the California Code of Civil Procedure which has since been superseded by California Code of Civil Procedure section 231.

cognizable on habeas. Nevertheless, the *Hines* court found that the deprivation of half of the allotted peremptories violated due process because it "may vitally affect the integrity of the jury selection process and, by implication, the fairness of the trial itself." *Hines*, 658 F.2d at 672. Thus, two of the cases, *Hines* and *Workman*, are in direct conflict.

The third case that is perhaps marginally relevant for *Teague* purposes is *Watson v. Camp*, 848 F.2d at 89. In *Watson*, the defendant was denied his statutory right to a peremptory challenge for an alternate juror. The Seventh Circuit recognized both *Workman* and *Hines* and expressly declined to adopt either one. *Id.* at 92. The court then examined the nature of peremptory challenges, noting that "there is no general constitutional right to a particular number of peremptory challenges." *Ibid.* In language that was less than precise, the court ultimately concluded that there was no constitutional violation. *Ibid.* However, it is not clear from the opinion whether the court felt there was no federal question, or whether there was a federal question but no demonstration of constitutional error.

The fourth case discussing this issue was *Pruett v. Thigpen*, 665 F. Supp. at 1254. In *Pruett*, the petitioner claimed that his jury was not impartial as a result of the trial court's erroneous denial of a "for cause" challenge. The trial court apparently confused the juror's clear admissions of bias with the statements of another panel member, and thus erroneously declared that the juror could be impartial. *Id.* at 1265. At the time of the challenge, the defendant had unused peremptory challenges, but ultimately used all his peremptory challenges on other jurors. *Ibid.*

The district court in Mississippi examined relevant Fifth Circuit authority and found: "In § 2254 proceedings, the question of whether impairment of right to exercise a full allotment of challenges contravenes sixth

amendment right to an impartial jury remains an open one." *Ibid.* Ultimately, however, the court granted habeas relief because it found that the juror who sat was actually biased. *Id.* at 1266. Thus, *Pruett* did not have to squarely address the question of whether, in the absence of a showing of a biased jury, the denial of peremptory challenges was a constitutional violation.

The fifth and final case discussing the peremptory challenge issue was *Celestine v. Blackburn*, 750 F.2d at 360. In that case, the court found that the trial court had not erred in denying a for cause challenge; thus, the defendant was not denied a peremptory challenge. The court hinted that such claims might not be cognizable in habeas, but ultimately concluded that the question remained open.

Thus, in 1994, the most that can be said is that there was a dispute between the circuits. Eight different circuits had addressed the issue, with differing and sometimes contradictory results. Faced with such a legal landscape, a reasonable jurist would certainly not be able to discern any clear precedent. Given the wide diversity of these opinions, it cannot be denied that the issue was "susceptible to debate among reasonable minds," and thus, any new rule, including the one announced by the Ninth Circuit in the opinion below, would be a *Teague* violation.

The final stage of the *Teague* analysis is to determine whether the new rule advanced by a habeas petitioner is important enough to grant relief such that it falls within one of the two narrow exceptions to the *Teague* bar. The first *Teague* exception is for new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague v. Lane*, 489 U.S. at 307. There is no claim that Vansickel's crime (murder) is something that cannot be proscribed. Thus, the first exception is clearly inapplicable.

The second *Teague* exception is for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. at 495. Such rules have been held to be among the "small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty." *Goeke v. Branch*, 514 U.S. 115, 115 S.Ct. 1275, 131 L.Ed.2d 152 (1995). An example of such watershed rules is the right to counsel announced in *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963). *Gray v. Netherland*, 518 U.S. 152, 116 S.Ct. 2074, 2085, 135 L.Ed.2d 457 (1996). New rules that do not fall within the exception include the right to jury instructions which clearly explain lesser included offenses (*Gilmore v. Taylor*, 508 U.S. 333, 335, 113 S.Ct. 2112, 124 L.Ed.2d 306 (1993)), and the right not to be interrogated outside the presence of counsel once an attorney is requested. *Greenawalt v. Ricketts*, 943 F.2d 1020.

While it may well be that there is a fundamental right to an impartial jury even in the absence of the Sixth Amendment guarantee, it is difficult to see how the doctrine could be extended to create a fundamental right to only one of many tools designed to obtain an impartial jury. In addition to peremptory challenges, there exist the voir dire questions, for cause challenges, extensive admonitions and instructions, as well as procedures designed to ensure venires composed of a representative cross-section of the community. An error in any one of these areas, especially one that does not deny the right entirely but merely diminishes it, simply does not implicate notions of fundamental fairness or diminish the accuracy of the verdict. See *Saffle v. Parks*, 494 U.S. at 495.

Neither of the *Teague* exceptions applies. Accordingly, the Ninth Circuit's announcement of a new rule cannot be reconciled with *Teague* and it progeny. Certiorari should therefore be granted.

CONCLUSION

For the foregoing reasons Petitioner prays the petition for writ of certiorari be granted.

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